INDEX

		Page
1.	Statement of Facts	1-5
2.	Issue	5
3.	Michigan Statutes Involved	6-9
4.	Summary of Argument	9
	I. Section 4 of Act 85, Public Acts of 1921, as amended (the Michigan Privilege Tax Law) is not unconstitutional in its application to Appellant because of the nature of the business in which said Appellant is engaged	9
	(A) The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though such business be foreign commerce or there be included in the measure of the value of such privilege property exempt from direct taxation	10
	(B) The tax imposed by Section 4 of the Tax Law is a tax upon the privilege of exercising corporate franchises or doing corporate business within the State and is a true excise tax. It is not a tax upon the property or business. The net worth of the corporation (its paid-up capital and surplus) for a preceding year being used merely as the measure of the value of the future exercise of the privilege	10
	(C) Michigan has not attempted under the guise of an excise tax to tax the business or property used exclusively in foreign commerce or the privilege of engaging in foreign commerce	10
	II. The Appellant is not entitled to the relief asked in this case assuming this Court holds the law constitutional in its application to Appellant—that of exemption of	

Page

the value of the property from the computation of the tax—because of its being used exclusively in foreign commerce for the reason the Bridge Company is not engaged in carrying on commerce and its property is not so used by it 10

5. Argument 11-38
6. Cases Cited by Opposing Counsel 39-44
7. Conclusion 44

CITATIONS

Anglo-Chilean v. Alabama, 288 U. S. 218 23
Arkansas & Memphis Ry. Bridge & Terminals Co. v. State, 174 Ark. 420 31
Ashley v. Ryan, 153 U. S. 436 25
Baltic Mining Co. v. Massachusetts, 231 U. S. 68 ..... 18, 29
Cobbs & Mitchell v. Corporation Tax Appeal Board, 252 Mich. 479 21
Detroit & Windsor Ferry Co., 232 Mich. 574 35
Detroit International Bridge Co. v. Corporation Tax Appeal Board, 257 Mich. 52 2-19
Detroit International Bridge Co. v. Corporation Tax Appeal Board, 267 Mich. 384 (Advance Sheets) 5
Detroit International Bridge Company v. Corporation Tax Appeal Board, 287 U. S. 295 3
Detroit Properties Corp. v. State, 254 Mich. 525 21
Educational Films Corp. of America v. Ward, 282 U. S. 379 ..... 13, 15
Flint v. Stone Tracy Co., 220 U. S. 107 ..... 12, 14
G. H. Hammond Company, 246 Mich. 179 23
Henderson Bridge Co. v. Kentucky, 166 U. S. 150 30
Home Insurance Co. v. New York, 134 U. S. 594 17-18
Hump Hairpin Co. v. Emmerson, 258 U. S. 290 19-36
Kansas City, Fort Scott & Memphis Ry. Co. v. Botkin, 240 U. S. 227 ..... 15, 17, 32, 33
Kansas City, etc. R. Co. v. Stiles, 242 U. S. 111 36
Kentucky & Indiana Bridge Co. v. L. & N. Ry. Co., 2 Int. Com. Rep. P. 351 34

Page

Koekuk & Hamilton Bridge Co. v. Illinois, 44 Law E. 299 35
Macallen Co. v. Massachusetts, 279 U. S. 620..... 26
Maine v. Grand Trunk Ry. Co., 142 U. S. 217.....15-29
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 521..... 13
National Leather Co. v. Massachusetts, 277 U. S. 413 19
New York v. Jersawit, 263 U. S. 493, 496..... 23
Pacific Co. v. Johnson, 285 U. S. 480, 489..... 16
People Ex Rel Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm., 232 N. Y. 42 23
People of the State of Michigan v. Michigan Trust Co., 286 U. S. 334 21
Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326 34
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 13
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120 19
Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261 33
United States Glue Co. v. Oak Creek, 247 U. S. 321, 328 15
Wisconsin-Michigan Railway Co. v. Powers, 191 U. S. 379 29

TEXT BOOKS

Ruling Case Law, 4, p. 560..... 27
Corpus Juris, 12, p. 37 27
Lust, Digest of decision of Interstate Commerce Act Vol. 1, p. 213 27

STATUTES

Act No. 85, P. A. of State of Michigan, 1921, Sec. 4 9
Act No. 85, P. A. of State of Michigan, 1921, Sec. 5 6
Act No. 175, P. A. of State of Michigan, 1929 (being amendment to Sec. 4 of Act 85, P. A. 1921)..... 6
Act No. 327, P. A. of State of Michigan, 1931, Sec. 10 7
Act No. 327, P. A. of State of Michigan, 1931, Sec. 82 7

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1934

NO. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLEE, CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

STATEMENT OF FACTS

Appellant is a corporation organized under the laws of the State of Michigan primarily for the purpose of constructing, maintaining and operating an international bridge between Detroit, Michigan, and Sandwich, Ontario, Canada, and collecting tolls for its use.

It paid its initial organization or franchise fee to the State for the purpose of coming into existence and with the acceptance of its corporate franchise accepted the liability of the annual privilege tax provided by Section 4, of Act 85, Public Acts of 1921, as amended.

The Bridge Company paid its privilege fees for the years 1927 and 1928. In 1929 it tendered its annual report accompanied by the minimum privilege fee of $10.00, claiming among other things, exemption of the value of the bridge structure due to its use in foreign commerce. Later Appellant withdrew this claim admitting its liability to the tax inasmuch as the bridge was under construction and not open to the public, thereby disclaiming it was engaged in carrying on commerce.

The 1930 annual report was submitted together with check in the amount of $147.92 to cover $2.00 filing fee and $145.92 privilege fee. Appellant, in said report, raised the claim for exemption on several different issues including the constitutional question which is here on appeal in the case at bar. The other issues raised in said case, all of which were disallowed by the Appeal Board, are not important in this case. The Bridge Company appealed from the determination of the Tax Appeal Board to the State Supreme Court and argued before said Court the invalidity of Michigan's so-called Privilege Tax Law in its application to Appellant. Judgment was entered sustaining the determinaion of the tax by the Corporation Tax Appeal Board thus sustaining and upholding the validity of Michigan's so-called Tax Law. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 257 MICH. 52.

An appeal was taken to this Court and the case argued

in the October Term, 1932. Judgment was entered confirming the judgment of the State Supreme Court. The same question which is presented in the instant case was before this Court in the former case. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 287 U. S. 295.

The Court in passing upon the issue presented did not consider the question as to whether Appellant was engaged in foreign commerce and said in part:

> "• • • we are of the opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause".

Appellant argued before this Court, the Bridge Company was without power or authority under its charter to do any other than a commerce business, although the amended Articles of Incorporation specified various purposes. Subsequent to the decision of this Court, Appellant amended its Articles of Incorporation and eliminated its avowed incidental purposes, thereby claiming it is now restricted by its charter to carrying on of foreign commerce. The present amended purposes read:

> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> "To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use".

Thus by its voluntary action—that of amending its Articles of Incorporation—Appellant imposes restrictions which it now claims as a proper defense in its attempt to invalidate the Privilege Tax Law. It will be noted the Bridge Company *exercised its franchise* in amending its Articles. It still retains the power to amend and enlarge its purposes at will which we contend, is a valuable right and which unquestionably should make Appellant subject to the Tax Law. Surely it was not the intention of the framers of the Michigan statute that its effectiveness should be made subject to such mere caprice. The Bridge Company still possesses its *right* to *exercise* its *corporate franchises* in Michigan and is using its franchise in carrying on its business through its Detroit offices. Under the Bridge Company's charter granted to it by the State it is in possession of all the powers granted by this State to subjects of its creation. (See Section 10, Act 327, Public Acts of 1931), Supra.

Subsequent to the filing of said amendment on August 30, 1933, the Bridge Company submitted its annual report to the State for the year 1933, enclosing its check for $2.00 filing fee, claiming exemption from the imposition of the privilege tax stating it was now *indisputable* the only power the corporation had was to engage in and carry on foreign commerce and therefore it was without liability as to the privilege tax and further claiming the imposition of such a tax by the Secretary of State would contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States.

The Secretary of State disallowed the claim of Appellant and computed the privilege tax upon its paid-up capital of $1,505,300.00 @ 2½ mills, amounting to $3,763.25. The amount was not paid. Appellant filed an appeal to the Corporation Tax Appeal Board and said Appeal Board sustained the Secretary of State in his

determination of the fee. The case was then appealed to the Supreme Court of the State of Michigan to review the determination of the Tax Appeal Board and the constitutional question here present was argued before the Michigan State Supreme Court—that of the validity of Michigan's Tax Law in its application to Appellant. The State Court upheld and sustained the corporation Tax Appeal Board in its determination of the tax, and declared its tax law valid in its application to Appellant. See:

DETROIT INTERNATIONAL BRIDGE COMPANY vs. CORPORATION TAX APPEAL BOARD, 267 Mich. 384. (Advance Sheets)

Judgment was entered by the State Supreme Court on June 4, 1934. On June 29, 1934, the Bridge Company, by its counsel, filed in the Supreme Court of Michigan, an application for Leave to Appeal to this Court from the judgment of the State Supreme Court. The order allowing the appeal was signed and entered by the Chief Justice of the State of Michigan on July 2, 1934.

It is conceded by counsel for Appellant that the tax assessed against it was assessed in exact accordance with the provisions of the statute.

ISSUE

Two questions are presented in this issue:

I. Is the imposition of the privilege tax in its application to Appellant a violation of the Commerce Clause of the United States Constitution?

II. Is the Bridge Company engaged in foreign commerce?

MICHIGAN STATUTES INVOLVED

The privilege fee here claimed was imposed by the State of Michigan in accordance with the provisions of Act 85, Public Acts of 1921, as amended by Act 175, Public Acts of 1929, and provides in part as follows:

> "Sec. 4. Every corporation organized or doing business under the laws of this State, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the *privilege of exercising its franchise* and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. * * *". (Act No. 233 P. A. 1923). (Italics are ours).

This same section amended by Act 175, Public Acts of 1929, reads as follows:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, *having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.*" (Italics are ours).
>
> "Sec. 5. * * *None of the property or capital of

any corporation subject to paying the privilege fee prescribed in section four which is located without the state of Michigan, and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation of the net amount * * * or the capital and surplus, as the case may be, upon which the computation of the privilege fees shall be made: * * *".

Section 82, of Act 327, Public Acts of 1931, which provides for contents of annual report requires among other things:

"(m) A complete and detailed statement of the assets and outstanding liabilities of the corporation at the close of business on the thirty-first day of December or upon the date of the close of its fiscal year, next preceding: Provided, That every corporation organized on or after January first and prior to August thirty-first of any one year, and every foreign corporation admitted to do business subsequent to January first and prior to August thirty-first of any one year shall file a report showing the condition of its business on the date of its incorporation or admittance, with a filing fee of two dollars and a privilege fee of ten dollars.

* * *

(o) Such other information and facts as the secretary of state may demand and need for the purpose of computing the annual privilege fee provided by law."

Section 10, of same Act provides:

"POWERS. Every corporation, unless otherwise provided, or inconsistent with the act under which a particular corporation is or shall have been formed, shall have power:

a—to have succession, by its corporate name for the term stated in its articles;

b—to sue and be sued, complain and defend, in any court of law or equity or to be a party to any proceedings before any board or commission or other public body of this state or any other state or government;

c—to have a corporate seal which may be altered at pleasure and to use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise;

d—to acquire, purchase, hold, and convey real and personal estate and to mortgage or lease any such real and personal estate with or without any of its franchises, corporate or otherwise; the power to hold real and personal estate shall include the power to take the same by gift, devise or bequest;

e—to appoint such officers and agents as the business of the corporation shall require and to allow them suitable compensation;

f—to make, alter, amend and repeal by-laws for the regulation and government of its affairs, including the certification and transfer of its stock;

g—to conduct its business in this state, other states, the District of Columbia, the territories and colonies of the United States and in foreign countries and the territories and colonies thereof and have one or more offices out of this state and to acquire, purchase, hold, mortgage, pledge, assign, transfer and convey real and personal property out of this state, provided such powers are not specifically denied in the objects set forth in its articles;

h—to acquire, purchase, hold, sell and transfer shares of its own capital stock: Provided, That no corporation shall use its funds or property for

the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation: And provided further, That shares of its own capital stock belonging to the corporation shall not be voted directly or indirectly: And provided further, That nothing in this section shall be construed as limiting the exercise of the rights given by section thirty-seven of this act;

i—to guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidence of indebtedness created by, any other corporation or corporations of this state or any other state, country, nation or government, and, while the owner of the same, to exercise all the rights, powers and privileges of ownership including the right to vote thereon if such right be an incident of the same: Provided, That any corporation organized or doing business in this state under this act shall not have the power to guarantee or anywise become surety upon any bond or other undertaking securing the deposit of public moneys;

j—to borrow money and issue, sell, or pledge bonds, promissory notes, bills of exchange, debentures, and other obligations and evidences of indebtedness whether secured by mortgage, pledge or otherwise, or unsecured;".

SUMMARY OF ARGUMENT

I. *Section 4 of Act 85, Public Acts of 1921, as amended (the Michigan Privilege Tax Law) is not unconstitutional in its application to Appellant because of the nature of the business in which said Appellant is engaged.*

A. The States may lawfully impose an excise tax upon corporations for the *privilege* of exercising their corporate franchises or doing business within the State even though such business be foreign commerce or there be included in the measure of the value of such privilege property exempt from direct taxation.

B. The tax imposed by Section 4 of the Tax Law is a tax upon the privilege of exercising corporate franchises or doing corporate business within the State and is a true excise tax. It is not a tax upon the property or business. The net worth of the corporation (its paid-up capital and surplus) for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

C. Michigan has not attempted under the guise of an excise tax to tax the business or property used exclusively in foreign commerce or the privilege of engaging in foreign commerce.

II. ***The Appellant is not entitled to the relief asked in this case assuming this Court holds the law constitutional in its application to Appellant—that of exemption of the value of the property from the computation of the tax—because of its being used exclusively in foreign commerce for the reason the Bridge Company is not engaged in carrying on commerce and its property is not so used by it.***

ARGUMENT

POINT I

A.

The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though such business be foreign commerce or there be included in the measure of the value of such privilege property exempt from direct taxation.

This well established rule represents the universal holdings of this Court in cases where the tax was measured by the value of capital stock; by the net income of corporations, and has been held to apply to federal bonds, property in interstate commerce, patents, copyrights, and the income from such properties. See:

FLINT v. STONE TRACY CO., 220 U. S. 107
EDUCATIONAL FILMS CORPORATION OF AMERICA v. WARD, 282 U. S. 379
PACIFIC CO. v. JOHNSON, 285 U. S. 480-489
HOME INSURANCE CO. v. NEW YORK, 134 U. S. 594
KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, 240 U. S. 227
HUMP HAIRPIN CO. v. EMMERSON, 258 U. S. 290
UNITED STATES GLUE CO. v. OAK CREEK, 247 U. S. 321, 328
UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN, 254 U. S. 113, 120
NATIONAL LEATHER CO. v. MASSACHUSETTS, 277 U. S. 413.

In FLINT v. STONE TRACY CO., supra, a federal tax on corporations imposed "with respect to carrying on or doing business" and measured by net income, was held to be an excise, not a direct tax on property or income, and to be valid notwithstanding the fact that net income from tax-exempt municipal bonds was included in the measure of the tax. This Court, after discussing the previous decisions of the Court, said:

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. *The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.*" (Italics are ours).

and the Court further said:

> "It is therefore well settled by the decisions of this Court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This case is generally regarded as the leading case not only to the effect that a tax for the privilege of exercising corporate privileges measured by percentage of net income is not a property tax but also as authority to the effect that the inclusion of income from non-taxables in the net income yard-stick is legitimate. While this case involved a Federal Tax under the Federal Statute of 1909, it may not be distinguished from the case at bar for Congress has no greater authority to burden the instrumentalities of the States than the States have to burden those of the Federal Government.

POLLOCK v. FARMERS' LOAN & TRUST CO., 157 U. S. 429
METCALF & EDDY v. MITCHELL, 269 U. S. 514, 521.

EDUCATIONAL FILMS CORPORATION OF AMERICA v. WARD, 282, U. S. 379, we contend there is a close parallel between the Bridge Case and the Films Case and between the Michigan Tax Law and the New York Tax Law. The Films Case involves a New York statute providing for an annual tax on domestic corporations for the privilege of exercising their franchises in the State in a corporate or organized capacity. The tax is payable in advance for each year and is at a stated rate on the corporation's net income for its preceding fiscal year. This law is very similar to Michigan's so-called Privilege Tax Law. The only material difference being in New York the tax is based upon net income while in Michigan it is based upon net worth (paid-up capital and surplus). The plaintiff in the Films Case was the owner of copyrights granted by the United States upon motion picture films and had re-

ceived royalties for the licensing of them. The company contended that the tax was invalid on the ground that the copyrights and all income derived from them were exempt from State taxation and that the tax measured by net income was void so far as the measure included income from the copyrights, because it constituted a *tax* on *Federal instrumentalities.* This Court held in that case that the tax was not a direct tax upon allocated income of the corporation but a tax on the *privilege* of doing business in any one year. This Court said in part:

> "If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. * * * Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise."

This Court, in referring to FLINT v. STONE-TRACY and other cases, then said:

> "* * *it has been consistently held that the privilege of exercising a corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income which is made the measure of the tax may chance to include the obligations of the other or the income derived from them, and that the constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other."

The Court then mentioned other forms of excise taxes

which have been upheld upon like principles, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. Among other forms referred to were a State income tax on income, including income from interstate commerce (UNITED STATES GLUE CO. vs. OAK CREEK, 247 U. S. 321); a State tax upon the franchise of a corporation measured by its receipts from transportation properly apportioned to the business done within the State, although it includes receipts from interstate commerce (MAINE vs. GRAND TRUNK RY. CO., 142 U. S. 217); a tax on franchises of domestic corporations measured by corporate property, even though such property be without the State (KANSAS CITY RY. vs. BOTKIN, 240 U. S. 227).

Referring to the last mentioned type of tax this Court said:

> "So well settled is this last mentioned application of the doctrine that an excise may be measured by tax immune property, that an appeal in which such a tax was assailed on the very grounds urged here, was dismissed per curiam during the present term.
>
> No. 108, NEBRASKA ex rel. BEATRICE CREAMERY CO. vs. MARSH, decided Oct. 20, 1930."

Further quoting from the FILMS Case it was said by this Court:

> "• • •Having in mind the end sought, we can not say that the rule applied by this court for some 70 years—that a nondiscriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax-exempt property or income in the measure of it—has failed of its purpose, or has worked so badly as to require a departure from it now; or that the

present tax, viewed in the light of actualities, imposes any such real or direct burden on the Federal Government as to call for the application of a different rule."

By the same line of reasoning we contend the tax imposed by the Michigan law is valid in its application to the Bridge Company.

In view of the history of Michigan's Privilege Tax Legislation we believe this Court will agree that Michigan had no *major purpose* to strike at the business of the BRIDGE CO., or the privilege of engaging in a stated business, even though it be deemed the carrying on of commerce. There was no ulterior or sinister motive such as would invalidate its legislation, but quite to the contrary, should the business of the corporation be construed that of foreign commerce, it is but incidental in connection with the efforts of Michigan relative to taxing corporations on a legally permissible basis, the *right* or *privilege* to *exercise corporate franchises.*

THE PACIFIC CO. vs. JOHNSON, (supra) California case, involves the constitutionality of that portion of the Bank and Corporation Franchise Tax Act of California, measuring the amount of the State corporation franchise tax by percentage of net income and including within the income by which the amount of the tax is measured interest received from "Federal, State and Municipal or other bonds". The law was attacked upon the grounds of unconstitutionality as in the case at bar and this Court held the law valid and said in substance the corporate franchise, or privilege of doing business in corporate form, does not cease to be a legitimate subject of taxation because it is exercised in the acquisition

and enjoyment of non-taxable property. Upon the same theory we submit the corporation *franchise* or *privilege* of doing business in Michigan is a legitimate subject of taxation even though the *privilege* may include the carrying on of commerce by said corporation, which we deny.

In HOME INSURANCE CO. v. NEW YORK, supra, a statute of New York imposed a tax upon "the corporate franchise or business" of corporations doing business within the State measured by the extent of the dividends made or declared during the year. The Court held that the tax was an excise or privilege tax and not violative of the provisions of a federal statute exempting bonds of the United States from taxation, although a portion of the dividends may have been derived from interest on capital invested in such bonds.

In KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, supra, a statute of Kansas imposed a tax upon domestic corporations to be computed according to the amount of their paid-up capital stock. The corporation objected that the effect of the statute was to tax its income from interstate commerce. Mr. Justice Hughes, writing the opinion, said (at p. 232):

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation, —on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized

and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in SOCIETY FOR SAVINGS v. COITE, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in HOME INS. CO. v. NEW YORK, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in FLINT v. STONE-TRACY CO., 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. DELAWARE RAILROAD TAX, 18 Wall. 206, 231, 232; STATE RAILROAD TAX CASES, 92 U. S. 575, 603; PHILADELPHIA & SOUTHERN S. S. CO. v. PENNSYLVANIA, supra; ASHLEY v. RYAN, 153 U. S. 436; CORNELL STEAMBOAT CO. v. SOHMER, 235 U. S. 549, 559, 560. And, agreeable to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (BALTIC MINING CO. v. MASSACHUSETTS, supra), to emphasize the necessary caution that 'every case involving the

> validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Appellant may attempt to distinguish this case upon the ground that the tax is upon the *franchise to be* rather than upon the *franchise to do* as in the instant case. This should be unimportant inasmuch as the principal involved is the same in either case—that of the State's exaction of a franchise tax, for corporate privileges granted.

HUMP HAIRPIN CO. v. EMMERSON, supra, UNITED STATES GLUE CO. v. OAK CREEK, supra, UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN, supra, NATIONAL LEATHER CO. v. MASSACHUSETTS, supra, further establishes the principle that an excise on a corporation may be measured by its outstanding capital even though such capital be *used* in or *derived* from *interstate commerce.*

We submit these cases are authoritative and controlling in the case at bar.

It is further submitted the Court below was entirely correct in the former case, DETROIT INTERNATIONAL BRIDGE COMPANY v. CORPORATION TAX APPEAL BOARD, 257 MICH. 52, when Mr. Justice Sharpe in commenting upon the nature of the tax, has this to say: (R-57)

"We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of a corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law 'for the privilege of exercising its franchise and of transacting its business within this State' ".

It is our contention it is definitely settled law that the State may impose a privilege or franchise tax upon corporations for the *existence* of the *right* to exercise corporate franchises regardless of the kind of business in which they may engage.

B.

The tax imposed by Section 4 of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State and is a true excise tax. It is not a tax upon the property or business. The net worth of the corporation (its paid-up capital and surplus) for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

Unquestionably Michigan intended by Section 4, of Act 85, Public Acts of 1921, as amended, to impose an annual privilege or excise tax upon corporations not excepted in said act. It has enacted that such corporations shall pay in advance an annual tax, which, in the case of domestic corporations, is

"for the *privilege* of *exercising its franchise* within this State". The paid-up capital and surplus of the corporation for the preceding calendar or fiscal year are used as the measure of the value of the privilege.

That the tax so imposed is an excise or privilege tax has been definitely settled by the decisions in the following cases:

UNION STEAM PUMP SALES COMPANY v. SECRETARY OF STATE, 216 Mich. 261
DETROIT PROPERTIES CORPORATION v. STATE, 254 Mich. 525
DETROIT INTERNATIONAL BRIDGE CO. v. CORPORATION TAX APPEAL BOARD, 257 Mich. 52
DETROIT INTERNATIONAL BRIDGE CO. v. CORPORATION TAX APPEAL BOARD, 267 Mich. 384 (Advance Sheets)
COBBS & MITCHELL v. CORPORATION TAX APPEAL BOARD, 252 Mich. 479.

The construction placed upon Act 85, Public Acts of 1921, as amended, by its State Supreme Court in the cases enumerated, supra, and which has been sustained and upheld by this Court in PEOPLE of THE STATE OF MICHIGAN v. MICHIGAN TRUST CO., 286 U. S. 334, and in which it was said:

> "We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that the courts of the State, if they have spoken pronounce the final word. The decision of the Supreme Court of Michigan in re Detroit Properties Corporation, 254 Mich. 523, is a controlling adjudication as to the meaning and application of the

> privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to 'do'; that this privilege existed though nothing was ever done: * * * The tax in controversy is a State tax, and is laid not on the doing of business but on the mere privilege to do it. The State decision as to its meaning would control in case of conflict, but conflict there is none."

is proof conclusive of the *nature* and *kind* of tax under consideration. Unquestionably it is an excise exacted by the State for the *existence* of a *right* to do business in Michigan, which right Appellant has held during entire period covered by tax. If the State is attempting to tax the mere *existence* of a right not the *exercise* of it by the Bridge Company, then it is obvious this case involves but one inquiry, viz: *Has the Bridge Company held, during the period covered by the tax exaction, a right to do business in Michigan?* The answer must be in the affirmative. Since the tax is aimed at the *existence* of the right rather than the *exercise* of the right, it is apparent then an adjudication of the tax does not properly involve any inquiry as to what *kind* of business the company has been doing, or in which it may engage, whether foreign commerce or under a federal franchise, etc. The fact remains that Appellant applied for and has held during the entire period a *franchise* from the State of Michigan, and the mere *existence* of such a *right* is the object against which the tax is aimed.

It will be admitted the construction of the Michigan statute as announced by our Michigan Supreme Court in its decisions (supra) will not be challenged by this Court. The fact that the amount of tax exacted is computed on the basis of the value of property which might be used in foreign commerce does not inject a federal question in this case. So long as the tax is aimed at the

right to do intra-state business it is immaterial that the amount of the tax is predicated on the value of the property which might be employed in foreign commerce.

Since the tax in question is a tax on the *right* to do intra-state business and since the amount of such a tax may lawfully be computed on the value of property used in foreign commerce it is apparent the method employed by the State of Michigan in computing the amount of tax will not be questioned by the United States Courts as being a burden upon foreign commerce.

We submit the construction placed upon Michigan's so-called Privilege Tax Law by its Highest Court was made in accordance with applicable decisions of this Court. See:

PEOPLE EX REL. BASS, RATCLIFF & GRETTON, LTD. v. STATE TAX COMM., 232 N. Y. 42
NEW YORK v. JERSAWIT, 263 U. S. 493, 496
HOME INSURANCE CO. v. NEW YORK, 134 U. S. 594
KANSAS CITY, FORT SCOTT & MEMPHIS RY. CO. v. BOTKIN, 240 U. S. 227.

The questions under consideration by this Court in the cases, supra, were taxes upon a *privilege* granted and not upon the *exercise* of the privilege. Since the tax in question bears no relation to the exercise of the franchise, see: G. H. HAMMOND COMPANY, 246 MICHIGAN 179, it is equally true it has no relation to the particular kind of business in which a corporation may engage.

In a very recent case, ANGLO-CHILEAN v. ALABAMA, 288 U. S. 218, wherein the validity of the Alabama privilege tax law in its application to a new York corporation engaged in foreign commerce was the issue and wherein the statute was construed as being based

upon the *actual doing of business* rather than the *right* or *privilege,* this Court proceeded to make this distinction:

> "The Alabama statute is unlike that of Michigan examined here in *Detroit International Bridge Co.* v. *Michigan,* 287 U. S. 295, and *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334-342. There the tax upon a domestic corporation was imposed for the *mere right* to transact business." (Italics are ours)

We submit the Bridge Company is liable for the privilege tax because it is *organized* under Michigan Law and enjoys the *privilege* of exercising its franchise conveyed by the State.

C.

Michigan has not attempted under the guise of an excise tax to tax the business or property used exclusively in foreign commerce or the privilege of engaging in foreign commerce.

Appellant admitted its liability for the privilege tax up to and including the completion of the bridge in 1929. Its annual reports were filed and privilege fees paid for several years following its incorporation and hence it cannot claim the Michigan statute was *aimed* at the *kind* of business in which it might engage. In the instant case, not only has the statute been heretofore authoritatively construed as imposing a true excise tax, but there can be no suspicion that there has been any attempt by our Legislature to reach or tax the Bridge Company for engaging in any stated kind of business. The tax is for the *privilege* of exercising its *corporate franchise.*

In ASHLEY v. RYAN, 153 U. S. 436, Mr. Justice White in delivering the opinion for the Court said:

> "The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382 and 3384b, amended by act of April 11, 1890, 87 Ohio Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its powers to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. * * * Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for

> the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

Michigan's annual privilege tax was contained in the statutes when the Bridge Company was incorporated. Under the reasoning in the case, supra, the Bridge Company accepted the annual fee provision as a part of its obligation to the State creating it and should be estopped from now entering a denial of the State's right to impose the tax.

The effect of the decisions which we have cited and which seem to be conclusive upon the point at issue is in no way impaired by the decision of this Court in MACALLEN CO. v. MASSACHUSETTS, 279 U. S. 620, where Legislation was drawn to reach the property expressly excluded under the Federal Constitution.

POINT II.

The Appellant is not entitled to the relief asked in this case assuming this Court holds the law constitutional in its application to Appellant—that of exemption of the value of the property from the computation of the tax—because of its being used exclusively in foreign commerce for the reason the Bridge Company is not engaged in carrying on commerce and its property is not so used by it.

We believe should the corporate assets of this cor-

poration, represented by the value of the bridge structure be excluded from the measure of the tax, no one except the *user* of this bridge is entitled to claim the exemption.

We contend the Detroit International Bridge Company is not engaged in foreign commerce. It is not a carrier. It transports neither persons nor freight across the Detroit River and is not engaged in commerce of any kind. This constitutes in brief the opinion of our State Supreme Court. The Bridge Co. merely collects toll or a temporary license fee of pedestrians and owners of vehicles for the use of the bridge. While this traffic over the bridge may be construed commerce, yet the Bridge Company, itself, does nothing in the way of commerce.

See: 4 R. C. L. p. 560.

> "Where the charter of a Bridge Company confers upon it the franchise and powers of building, maintaining, and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the Bridge Company a common carrier of property; on the contrary they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private persons, upon making compensation therefor."

See: 12 C. J. p. 37.

> "It is not an act of interstate commerce to build and rent a bridge for the purpose of interstate commerce."

Lust, in The Digest of Decision of the Interstate Commerce Act Vol. 1, p. 213, states:

"Bridge companies; Construction of charters; Common carriers; Where the charter of a Bridge Company confers upon it the franchises and powers of building, maintaining and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not in and of themselves constitute the Bridge Company a common carrier of property. On the contrary they are appropriately confined to the erection, operation and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefore in the shape of reasonable tolls," and cites Kentucky and Indiana Bridge Company v. Louisville and Nashville R. Co., 2 I. C. R. 351.

In Paragraph H on the same page it is further stated:

"Where the charter of a Bridge Company makes its bridge and approaches thereto such as it had authority to construct a public thoroughfare or highway for the use of which, by railroads or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge 'reasonable tolls' • • • is strictly applicable to charges for the use of its highway rather than to compensation for transportation services which the Bridge Company may perform or be permitted to render."

We contend the Bridge Company merely furnishes an instrumentality by means of which commerce may be carried on by those making payment for the use of it. If the Bridge Company furnished transportation for passengers and goods over its structure, and actually carried out the purposes as carrier, we would have a different question, but such a question is not before us and therefore not an issue in this case. The Bridge Company is an owner—not a carrier. We admit the State cannot

impose a burden by taxation on foreign commerce. But on the other hand, the State may impose a franchise tax upon a corporation's *right* to do business, even though the corporation whose franchise is taxed is engaged in foreign commerce. See:

MAINE vs. GRAND TRUNK RAILWAY CO., 142 U. S. 217, 227, 228
WISCONSIN-MICHIGAN RAILWAY CO. vs. POWERS, 191 U. S. 379
BALTIC MINING CO. vs. MASSACHUSETTS, 231 U. S. 68

Counsel contends the Bridge Company as owner, because of its right to maintain the bridge and charge toll for its use, is engaged in commerce. This position does not seem well considered and counsel has cited no case sustaining such position.

Let us assume an instance where a corporation was organized for the purpose of constructing railway coaches which it leased to a carrier. The corporation maintained such coaches over the period covered by the lease. The carrier would be engaged in commerce, the coaches would be engaged in commerce, but could it be contended that the owner and builder was exempt from the privilege tax for the reason that:

1. That it was engaged in interstate commerce or,
2. That it was engaged in the maintenance, ownership and operation of an instrumentality of such business. Obviously such contention would be absurd; and yet the analogy of such situation to the facts of this case is readily apparent.

With the cases and authorities hereinbefore cited, we refer to the following decisions of this Court in support of our contentions.

The HENDERSON BRIDGE COMPANY vs. KENTUCKY, 166 U. S. 150, is a leading case and is sufficiently analogous to be decisive of this case. The suit was against the Bridge Company having an interstate bridge across the Ohio River. The suit being for the purpose of collecting intangible property tax. It was contended (as in this case) that the tax was a burden on interstate commerce; that the Bridge Company was engaged in interstate commerce:

> "Clearly the tax was *not* a *tax* on the *interstate business* carried on over or by means of the bridge, because the *Bridge Company did not transact such business.* That business was carried on by the persons and corporation which paid the Bridge Company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in New York, L. E. & W. R. Co. v. Pa., 158 U. S. 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance' ". (Italics are ours)

While the last mentioned case did not involve precisely the same character of tax as involved in this case, nevertheless the fact remains that the Court was called upon as in this case to decide whether an interstate Bridge Company is engaged in interstate commerce where it per-

mits others to use the bridge upon paying for such privilege; and the Court affirmatively declared that such Bridge Company was not so engaged. Counsel undertakes to distinguish this case by pointing out that another character of tax was involved, but we fail to see where such distinction weakens the effect of such decision as an authority in this case. The Court found it necessary, in determining liability, to answer the same abstract question which is presented in this case, viz: *Is the owner of this Interstate Bridge Company engaged in interstate commerce?* The Court answers the question in the negative. We fail to see why such answer would be inapplicable to this case merely because of the variation of facts pointed out.

See the Decision of the Kentucky Court of Appeals in this same HENDERSON Case (31 S. W. 486) in which the Court said:

> "This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and, when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transport merchandise and passengers over its structure, in consideration of reasonable rate of toll for so doing."

In ARKANSAS & MEMPHIS RY. BRIDGE & TERMINALS CO. vs. STATE, 174 ARK. 420-295 S. W. 378 (Certiorari having been denied by the Supreme Court, 275 U. S. 548). The facts in this case are almost identical to the case at bar and should be controlling. In that case the State of Arkansas attempted to enforce its privilege tax against the Arkansas & Memphis Ry. Bridge & Terminals Co., for the privilege of doing busi-

ness in the State. The Bridge Company was organized in Tennessee, but had been admitted to do business in Arkansas, therefore became subject to the imposition of the franchise tax.

Plaintiff contended its sole purpose was ownership and operation of an interstate bridge and therefore it was engaged exclusively in interstate commerce, and that the franchise tax imposed by the State was necessarily a tax upon interstate commerce. These contentions were denied by this Court in refusing to entertain the writ of certiorari.

The distinction pointed out by Appellant in this ARKANSAS case,—that the Bridge Company did not operate the bridge, but leased the structure to others—is without force or effect. The fact that the owner of the property leased it to a carrier would be in the same category as the Detroit Bridge Company, owner, collecting tolls and rentals from individuals choosing to use the bridge. In either case it represents remuneration for the use of the bridge. While it may be conceded there is a difference, it is without distinction.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY CO. vs. BOTKIN, 240 U. S. 227. In that case the tax was an annual privilege tax on domestic corporations. It was measured by capital representing property used in interstate commerce whether within the State or without.

The Michigan privilege tax statute is fairer than the one in the cited case, because only property in Michigan is used in measuring the amount of privilege tax due. We believe this case is in point with the one at bar.

Appellant's attempt to distinguish this case by stating

it was an annual privilege fee imposed upon the privilege of "being" or continuing "to be" a corporation rather than on the privilege "to do" is absurd. It is a privilege tax in either case imposed by the State upon corporations of its creation. The franchise "to be" as pointed out in the UNION STEAM PUMP SALES CASE, 216 MICH. 261, is the initial franchise paid but once, upon the formation of the corporation, while the privilege tax is an annual fee exacted each year for the *privilege* of exercisicising corporate franchises whether the corporation chooses to exercise such franchises or not during any taxable period. See G. H. HAMMOND, 246 MICH. 179.

This Court in reviewing the KANSAS CITY CASE had this to say:

> "We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

And the Court proceeds to cite authorities:

> " • • • It has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock."

This Court proceeded to point out not only the cases where the precedent for which we are maintaining has been upheld, but also the cases where the law of the State attempted to tax the *business* itself or the *privilege*

of *doing such business,* PHILADELPHIA & SOUTHERN STEAMSHIP COMPANY vs. PENNSYLVANIA, 122 U. S. 326, wherein it is said:

> "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between States and foreign countries, and from the charter of its vessels which was for the same purpose. It was necessarily concluded that the tax was imposed upon interstate commerce."

The distinction which this Court pointed out in this case applies with full force and effect to the case at bar. Michigan is not attempting to tax the *business* or the *privilege* of *engaging* in a stated kind of business, but rather is imposing an annual tax in this case upon a domestic corporation for the *mere naked privilege* of *exercising corporate powers.*

KENTUCKY & INDIANA BRIDGE CO. vs. L. & N. RY. CO., 2 INT. COM. REP., Page 351, same being the decision of a United States Circuit Court sitting in Kentucky in which the Court held:

> "The franchises and powers conferred upon petitioner of building, maintaining and operating its bridge and approaches, designed as its terminal facilities, do not in and of themselves constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties upon making compensation therefor in the shape of 'reasonable tolls'.

"The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto for the public purposes it was intended to subserve: That of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare—*and do not in any way constitute petitioner a common carrier of goods* authorized to equip its road or to charge compensation for transporting goods on or over the same." (Our Italics).

In KEOKUK & HAMILTON BRIDGE CO. vs. ILLINOIS, 44 LAW E. 299, virtually the same state of facts was presented as in the HENDERSON CASE. The Court was called upon to decide whether it would impose a capital stock tax on a Bridge Company owning an interstate bridge. The defense of interstate commerce was raised. The Court said:

"Nor was the tax a tax on interstate commerce",

and quoted from the HENDERSON decision, supra.

The Supreme Court of the State of Michigan in DETROIT AND WINDSOR FERRY COMPANY, 232 MICH. 574, a case involving the identical question as here presented, although the Ferry Company admittedly was carrying on foreign commerce, said:

"The Ferry Company is a Michigan corporation, and its property is located in Michigan. Its principal business is foreign commerce. The tax imposed is a specifiec tax—an excise tax. (Union

Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261). It is not a property tax. It in no way interferes with interstate or foreign commerce.

"The act makes reference to the capital and surplus and takes them into account in fixing the tax, but the reference is not for the purpose of taxing the property but to determine what is a fair price to charge for the franchise privileges."

And the Court proceeds to cite many cases in support of its holdings:

MAINE v. RAILWAY CO., 142 U. S. 217
FLINT v. STONE TRACY COMPANY, 220 U. S. 107
KANSAS CITY, etc. R. Co. v. STILES, 242 U. S. 111
HUMP HAIRPIN MNFG. CO. v. EMMERSON, 258 U. S. 290

In the last cited case it was said by Mr. Justice Clarke:

"While a State may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S. 335 (32 Sup. Ct. 211); International Paper Co. v. Massachusetts, 246 U. S. 135 (38 Sup. Ct. 292, Ann Cas. 1918C, 617), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principal of the cases so holding must be re-

garded as a settled exception to the general rule. Main v. Railway Co., 142 U. S. 217 (Sup. Ct. 121, 163); Wisconsin & Michigan R. Co. v. Powers, 191 U. S. 379 (24 Sup. Ct. 107); Flint v. Stone Tracy Co., 220 U. S. 107 (31 Sup. Ct. 342, Ann. Cas. 1912B, 1312); United States Express Co. v. Minnesota, supra; Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (34 Sup. Ct. 15); Kansas City, etc., R. Co. v. Stiles, 242 U. S. 111 (37 Sup. Ct. 58); United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327, (38 Sup. Ct. 499, Ann. Cas. 1918E, 748). The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

And in conclusion, the Court said:

"The rule forbidding a tax on interstate commerce applies with equal force to foreign commerce, but this does not aid the company, for *the tax in question is not one upon interstate* or *foreign commerce,* but a privilege tax imposed as an incident to the right to be a corporation, and exercise corporate functions by means of paid-up capital and surplus. The rule is too well settled that a State may not impose a tax upon interstate or foreign commerce to require the citation of authority. It is equally well settled that the *privilege tax* here involved is *not one upon interstate or foreign commerce.* The yardstick employed to measure the privilege tax scales the charge for corporate privileges granted and not to measure mere receipts from interstate or foreign commerce."

In the case at bar, Mr. Justice Fead, speaking for the State Supreme Court, (R-24) said in part:

"• • • We need not inquire whether plaintiff has any intrastate power under statutes regulating domestic corporations. Nor whether maintenance of the bridge is local business. Nor need the multitude of cases dealing with taxation and regulation of interstate and foreign commerce be analyzed or distinguished. In plaintiff's former case and In re Detroit & Windsor Ferry Company, 232 Mich. 574, where this court held that the fee is not a direct burden on foreign commerce, the fact that the corporations had local powers was not given weight. These cases are determinative upon plaintiff's liability for the fee.

"However, in determining the amount of the fee, the question whether the operation of the bridge is foreign commerce is presented because of the statutory exclusion from the computation of property used exclusively in interstate commerce. In this connection, 'interstate commerce' includes foreign commerce. In re Detroit & Windsor Ferry Company, supra.

"There can be no doubt that the bridge, if operated by a carrier, would be an instrumentality of foreign commerce. But this question under the statute is whether it is used in such commerce by plaintiff.

"Plaintiff conveys no persons or goods across the bridge or international boundary line. It merely collects tolls from such pedestrians or vehicles as use it. It provides an instrumentality which others may use in conducting foreign business. • • • "

and in conclusion said:

"In our opinion, the fact that plaintiff carries no persons or goods across the international line is determinative that it is not engaged in foreign commerce and its property is not so used by it.• • • "

CASES CITED BY APPELLANT DISTINGUISHED

Appellant relies upon cases which it interprets as establishing principles contrary to the rulings of this Court in the cases we have cited. It will be noted all cases relied upon by appellant represent corporations actually engaged in interstate commerce and the tax as levied in each case is directly upon the *gross* receipts of the corporation or upon the *business* transacted, either of which constitutes an interference with the power delegated to Congress. None of these cases detracts from the authority of the decisions which we have cited.

COVINGTON & CINCINNATI BRIDGE CO. vs. COMMONWEALTH, 38 LAW ED. 966, is not in conflict with the other cases cited by us. In the COVINGTON Case, the State of Kentucky attempted to *regulate interstate bridge tolls.* It involved entirely a different issue than is presented in this case. The Court, of course, denied the right of a State to regulate interstate tolls. It is interesting to note, however, that the Court, while holding an interstate bridge to be a highway for interstate commerce, remarked:

> *" • • • The Bridge Company is not itself a common carrier."*

See p. 969, 38 Law. Ed.

KINZEL vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO., 250 U. S. 130. This case comes under the Employer's Liability Act wherein an employee in charge of

certain cars was injured. It was admitted the company was engaged in interstate commerce. The Court held the employee was engaged in interstate commerce within the meaning of the act.

OZARK PIPE LINE CORPORATION vs. MONIER, THE STATE TAX COMMISSION OF MISSOURI, 266 U. S. 555, EUREKA PIPE LINE COMPANY vs. HALLANAN, 257 U. S. 265; UNITED FUEL & GAS CO. vs. HALLANAN, 257 U. S. 277.

In the above cases Appellants were admittedly engaged in interstate commerce. Any tax levied against the carrier pipe line company on oil transported would necessarily be a tax upon the commerce. These cases cited would be more in point to the Bridge Company, had Appellant found a case where the producing company was held liable for the State tax rather than the pipe line company, actually engaged in commerce.

In PEDERSON vs. DELAWARE, LACKAWANNA & WESTERN RD. CO., 229 U. S. 146. This case involves the right of recovery under Employer's Liability Act. An employee of the railroad company engaged in carrying bolts to be used in the repair of a bridge was injured. The Court held as an employee of the railroad company he was engaged in interstate commerce, but note this: *the employee was working for the railroad company, and was not working for an owner Bridge Company.*

We have found several cases holding that employees of carrier railroad companies, while engaged in repairing a

bridge, were engaged in interstate commerce; but we have found absolutely no case where an employee of a lessor or owner Bridge Company was held to be so engaged.

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY vs. SMITH, 250 U. S. 101. In this case it was held that a cook in a camp car on a siding near a railroad bridge (which bridge was being repaired) was engaged in interstate commerce. *But again as in the previous case the cook was working for the railroad company.*

The judicial decision that an *employee* of a *common carrier* is engaged in interstate commerce is no authority for a claim that an owner *Bridge Company* is engaged in interstate commerce.

STATE vs. BATES & ROGERS CONSTRUCTION CO., 19 WASH. 183-157, PAC. 483. The same point is involved. A contractor employed by the railroad company was injured in the repair of the bridge and the Court held the employment was in the nature of interstate commerce.

We see no possible connection between cases of this nature and the one at bar. The Bridge Company is not engaged in commerce of any kind.

GLOUSTER FERRY CO. vs. PENNSYLVANIA, 114 U. S. 196; CITY OF SAULT STE. MARIE vs. INTER-

NATIONAL TRANSIT CO., 234 U. S. 333; MAYOR OF VADALIA vs. McNEELEY, 274 U. S. 676.

These cases are readily distinguishable. Pennsylvania assessed a tax against a New Jersey corporation doing a purely interstate business. Admittedly this was an interference of interstate commerce and the Court so held.

In the CITY OF SAULT STE. MARIE case a license tax is involved. This tax was exacted from everyone, whether corporation, partnership or individual before it could engage in the carrying of passengers between the American and Canadian shores. The license, it will be seen, applied directly to the business of carrying passengers. It regulated a matter which was subject to the exclusive control of Congress and was consequently unconstitutional.

The same is true of the MAYOR of VADALIA Case vs. McNELLEY, 274 U. S. 676, involving a license for operating a public ferry across the Mississippi River and carrying passengers. The question presented was whether or not the town could make its consent and license a condition precedent to the right to engage in transportation of passengers by means of ferry and it was held this it may not do. The withholding of the license would necessarily prevent the owner of the ferry from transporting passengers and there would be a direct interference of the regulation of authority belonging to Congress.

Inasmuch as the *Appellant* is not engaging in carrying on transporting none of these cases are in point.

NORTH CAROLINA RAILROAD COMPANY v. ZACHARY, 232 U. S. 248, is not authoritative or even at point with the case at bar. This case covered a damage

suit for the negligent killing of a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred in North Carolina in 1909, and in which the Supreme Court held the lessor responsible for all acts of negligence. The Court said in part:

> "Under the local law, as laid down in LOGAN v. RAILROAD, 116 NOR. CAR. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; * * * ".

Both railroad companies were engaged in interstate commerce. Obviously the facts in the case suggest the reason for the decision.

Counsel for Appellant refers to the fact that this Court has held the Federal Government may itself construct a bridge across a stream from one state to another as a means of linking up an interstate highway under the powers to regulate interstate and foreign commerce, and cites several cases supporting this holding. We are entirely in accord with this statement. However, we see no reason why the Federal Government may not construct a bridge in the interest of commerce if it so elects. The Federal Government is interested in the commerce being carried on over the bridge and in such interest logically could provide such an instrumentality. However, we fail to see where this rule applies to the case at bar. The Federal Government did not construct the Ambassador Bridge. It was built by the Detroit International Bridge Co., which we contend is not promoting commerce over its bridge by means of transportation. It merely owns the property and charges tolls for the use of

those desiring to use it. In other words, it is the traffic over the bridge which constitutes commerce, not the mere ownership of the property.

CONCLUSION

We respectfully submit the annual privilege tax of the State of Michigan is not imposed upon Appellant for the privilege of engaging in foreign commerce or any other kind of business. It is imposed for the mere *right* or *privilege* of exercising its corporate franchises. It has been and still is in the enjoyment of this privilege for which the State is exacting the tax.

Viewing the case in this light it is apparent no Federal question is involved. We therefore respectfully submit that the judgment of the Supreme Court of the State of Michigan should be affirmed.

Respectfully submitted,

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